JD–102–16
Tyler, TX

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

DELEK REFINING, LTD.

and **Cases 16–CA–161390**
16–CA–165355
16–CA–173498

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL–CIO–CLC

Eva C. Shih, Esq., for the General Counsel.
H. Michael Bush, Esq., (Chaffe McCall, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This case was tried in Tyler, Texas on June 27 and 28, 2016. The complaint alleged that Delek Refining, Ltd. (Delek or the Respondent) violated Section 8(a)(1), (3) and (5) of the National Labor Relations Act (the Act). On the entire record, including my observation of the witnesses' demeanors, I make the following

FINDINGS OF FACT[1]

I. JURISDICTION

At all material times, Delek, a corporation with an office and plant in Tyler, Texas, has operated a refinery. Annually, it purchases and receives at its refinery goods worth over $50,000 directly from points outside of Texas. It, thus, admits, and I find, that it is an employer engaged in commerce, within the meaning of Section 2(2), (6) and (7) of the Act. It also admits, and I find, that the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO–CLC (the Union) is a labor organization, within the meaning of Section 2(5) of the Act.

[1] Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Procedural History

1. Pre-existing Bargaining Unit

The Union has been the longstanding exclusive collective-bargaining representative of Delek's production and maintenance workers (PM unit), which is described below:[2]

> [A]ll regular maintenance, production, and operating employees as well as specific hourly safety employees … employed at the … refinery excluding supervisory, technical, clerical, safety, plant protection and security, marketing terminal, loading rack and its employees, and professional employees.

(Jt. Exh. 1). This recognition has been memorialized in several consecutive contracts, including the February 1, 2015 to January 31, 2019 agreement (the CBA). (Jt. Exh. 20).

2. RC Petition for Warehouse Technicians (the warehousemen)[3]

On April 10, 2015,[4] the warehousemen filed a petition, which sought to select the Union as their representative. (Jt. Exh. 1). They simultaneously sought inclusion in the PM unit, which Delek challenged. Following a hearing, the Regional Director for Region 16 of the National Labor Relations Board (the Board) found that inclusion was appropriate and directed an election. (Jt. Exh. 3). Delek's subsequent appeal was unsuccessful. (Jt. Exhs. 4–5). An election was then held on June 12, which the Union won. (Jt. Exhs. 6–7).

3. Bargaining Demand and Refusal

On August 7, the Union sought bargaining concerning the warehousemen, which Delek refused. (JT. Exh. 8). The Region issued complaint over Delek's refusal to bargain; the case was then transferred to the Board via a summary judgment motion, which affirmed its earlier ruling on inclusion.[5] (Jt. Exhs. 9–15).

B. Warehouse Operations Generally

The warehouse is open from 7 a.m. to 7 p.m. on weekdays. It is physically secured, and only limited access is granted to non-warehouse personnel. It is run under the auspices of the Reliability Asset Management System (RAMS), i.e., a manual containing recommended business practices connected to the continuous operation of the refinery. (R. Exh. 9). Thomas Lynn supervises the 3 warehousemen currently employed at the refinery, i.e., Micah Sharman, CJ

---

[2] There are approximately 130 employees in the PM unit.

[3] These employees are interchangeably called storeroom or warehouse attendants or technicians.

[4] All dates herein are in 2015, unless otherwise stated.

[5] Delek then appealed to the 5th Circuit Court of Appeals, which enforced the Board's order. (Jt. Exhs. 16–17).

Hughes, and Mark Bishop.[6] Lynn reports to Administration Manager David Anderson.

Warehousemen receive, maintain, retrieve, and distribute inventory; they use forklifts and other equipment, record inventory data and prepare reports.[7] They work 7 a.m. to 4 p.m., and 10 a.m. to 7 p.m., shifts, which are periodically rotated. A rotating on-call list is maintained to retrieve inventory that is requested after-hours and assign overtime.

C. Allegedly Unlawful Statements

Between the April petition and the June election, Delek held a series of meetings. The General Counsel avers that several comments made at these meetings were unlawful.

1. April 17 Meeting

This meeting was attended by: Anderson; Vice-President Louis Labella; Director of Human Resources David Duford; Lynn; and the warehousemen.

a. General Counsel's Evidence

Sharman testified that the following exchange, which was led by Duford, occurred:

> They … ask[ed] us why we wanted to join the Union …. Then [Duford] asked what we thought we would get …. Hughes finally … said … he wanted to go Union … because … he wanted better insurance, and that's when … Duford said that it wasn't guaranteed that we're going to get better insurance, [and] that we wouldn't get any more money if we went Union, … that we would lose our [Stock Appreciation Rights] SARS, which is our benefits…. He also … said that we would not be able to bid on other jobs … and … we would lose our seniority….

(Tr. 60). Sharman recalled saying that he wanted to unionize in order to apply for PM unit jobs. He said that Duford answered that he "threw [his application out]… when he saw that we … applied to go Union." (Tr. 61; GC Exh. 5). Clark and Bishop also recalled this encounter.

b. Delek's Evidence

Duford denied asking why employees wanted to unionize, or saying that applications were discarded. He recalled stating that everything was negotiable in collective bargaining, including benefits and seniority. He also recollected stating that, if the warehousemen joined the PM unit, their seniority might commence from that point. He said that he told employees that they had the right to apply for any refinery jobs desired. He acknowledged stating that the PM unit did not receive SARS. He offered examples of warehousemen, who applied for positions during the organizing drive, whose applications were processed. See, e.g., (R. Exhs. 1–2). He explained that Sharman was not transferred to other jobs because he lacked the requisite skill and

[6] Shawn Clark was a warehousemen, until his February 12, 2016 termination.

[7] Inventory includes office supplies, pumps, chemicals, seals, hardware and machinery; it is valued at $10 million.

experience.[8] LaBella corroborated Duford.

c. Credibility Resolution

Given the divergent accounts concerning what occurred at this meeting, a credibility resolution is warranted. For several reasons, Delek's witnesses have been credited. First, they were straightforward, and held strong demeanors. Second, it is deeply implausible that Delek, which already had 130 unionized employees at the refinery and a stable existing relationship with the Union, would have intensely cared about whether 3 additional warehousemen wanted to organize. It, thus, follows that it is unlikely that Delek would have passionately retaliated by threatening to cut bonuses and other benefits. Third, it is equally implausible that Duford, a seasoned labor relations professional, would have outlandishly told workers that their applications had been thrown away in a room full of witnesses, or that they could not bid on jobs. Fourth, Duford's account is consistent with other campaign documents. See (R. Exhs. 3, 8). Lastly, it is likely that the warehousemen, who were navigating uncharted waters, construed Duford's several innocuous and truthful comments as threats, which was an unfair construction under the circumstances. I find, in sum, that the following occurred: (1) Duford said that everything was negotiable in bargaining, and reasonably contrasted PM unit and warehousemen benefits; (2) Duford correctly noted that the PM unit's CBA does not provide SARS or bonuses; and (3) he related that the PM unit's CBA defines wages and raises for a set period, legislates job bidding procedures, and has seniority definitions, which might ultimately be less favorable to warehousemen, who sought to be dovetailed into the CBA. I further find that the following did not occur: (1) Duford did not tell employees that their applications had been thrown away, or would not be processed; and (2) he did not ask them why they were unionizing.

2. June 3 Meeting

a. General Counsel's Evidence

Sharman stated that Anderson, Duford and Lynn held a meeting on this date with the warehousemen. He recollected Duford threatening that they could lose vacation leave and seniority, if they unionized. Clark corroborated his account.

b. Delek's Response

Duford testified that he discussed how the PM unit's CBA calculated seniority and determined vacation accrual. He also recalled stating that everything is negotiable in bargaining.

c. Credibility Resolution

Duford's account has been credited for the same reasons previously cited. Additionally, he reasonably explained that a consequence of unionizing and being dovetailed into the PM unit might involve warehousemen receiving new seniority dates in the PM unit, which were less favorable than their current dates, and might, in turn, impact certain CBA benefits.[9] He also

[8] He added that Sharman was rejected for the process technician job because he solely held warehouse experience.

correctly pointed out that everything is negotiable. It is plausible that the warehousemen construed this rational discussion as a threat, which it was not.

3. June 10 Meeting

a. General Counsel's Evidence

Sharman stated that Anderson told the warehousemen that they could lose their vacation, seniority and annual bonuses, if they unionized.

b. Delek's Response

Anderson denied making any threats and insisted that he limited his comments to the following talking points, which Duford drafted on his behalf:

> [W]e want to make sure that you have … the facts ….
>
> We do not believe you need … [a] union … because [we have] … been fair ….
>
> You are receiving excellent benefits … that … our unionized employees do not receive; such as annual … bonuses, SARS, … [and] vacation….
>
> THE UNION CANNOT "GUARANTEE" YOU ANYTHING; EVERYTHING IS SUBJECT TO NEGOTIATION ….
>
> For example, under the current Labor Agreement:
>
> > You would have to complete a probationary period ….
> >
> > Your current vacation allotment … would be paid out and you would not be eligible for vacation in 2015 because of the way union employees' vacation benefits have been negotiated.
> >
> > You would be granted a total of fifty-six (56) hours of vacation time allotment in 2016. Compare that to what you get now ….
>
> Your hourly wage is subject to negotiations, but in the current Labor Agreement there are no classifications with a wage range - like you have now …. Any increases would subject to negotiation [with] … the Union, not between you and the Company anymore….

(R. Exhs. 3, 8).

---

[9] The CBA contains varied types of seniority, and it is debatable whether plant seniority includes seniority outside the PM unit. The handling of this complex issue would affect the warehousemen's vacation and other benefits.

c. Credibility Resolution

Anderson has been credited. He was a highly credible, thoughtful and forthright witness, with a stellar demeanor. I find, as a result, that he limited his commentary to the latter talking points, which were legitimate and accurate.

4. June 15 Statement

a. General Counsel's Evidence

Sharman testified that Lynn stated that the warehousemen would lose their seniority, raises and bonuses, if they unionized. (Tr. 77). Clark corroborated his account. (Tr. 160).

b. Delek's Response

Lynn recalled telling the warehousemen that:

> They would lose their seniority and it would start all over again. They would put their name in a hat … and draw out of a hat, [and] that would be their seniority.

(Tr. 403).

c. Credibility Resolution

Sharman's account has been credited. Lynn conceded that he told employees that they would lose their seniority. Unlike Duford, he did not present this scenario as a potential outcome associated with good faith bargaining regarding the warehousemen being dovetailed into the CBA. He, instead, made a blanket threat, unaccompanied by reasonable context. Additionally, Lynn was a less than credible witness, with a poor demeanor.

5. July 8 – Union Stickers on Hard Hats

Sharman testified that Lynn ordered him to remove all stickers from his hard hat, including the Union stickers that were affixed when the organizing drive began. Lynn conceded that he issued this directive. (Tr. 404–405).

6. December 22 Comment

Clark recalled Lynn stating that the warehouse would be undergoing changes and that if the warehousemen didn't like it, "McDonald's is always hiring." Lynn admitted this comment.

D. Sharman's and Hughes' Transfer Applications

1. General Counsel's Evidence

In January, Sharman and Hughes applied for Field Technician positions. (R. Exhs. 1–2).

They were subsequently rejected.

2. Delek's Evidence

Duford testified that Sharman and Hughes applied for Process Technician and Field Technician slots. He recalled over 520 candidates applying for only 12 open jobs. He said that Sharman and Hughes were rejected because they mainly held warehouse experience, and lacked any experience in the posted positions.[10] He said that the open positions required industrial, gas, oil and manufacturing experience, which they lacked. He said that there were many qualified candidates, and that Delek, consequently, took no further action on their applications.

E. Sharman's Work Station Relocation

On December 3, Sharman's work station was relocated from the warehouse office to a nearby break area, which was smaller and less private. Anderson explained that Delek allocated $60,000 to buy high density storage cabinets in 2015 under RAMS, and that Sharman's relocation was necessitated by the installation of these cabinets.[11] Sharman's work area remains air conditioned.

F. Smoking Policy

Sharman testified that, after the election, Lynn told the warehousemen that they must take their 2, 15-minute smoking breaks at 10 a.m. and 3 p.m. He added that warehousemen were previously afforded more than 2 breaks as long as their total time did not exceed 30 minutes. (Tr. 111). Clark corroborated this matter. Lynn stated that he received a complaint from a security officer that his warehousemen were exceeding their break allotment. He said that he consistently reminds employees about break limitations, and that ongoing compliance is spotty. He noted that he acted in accordance with the Employee Handbook and his own past practices. (Jt. Exh. 18).

G. Unit Work, Warehouse Access, Overtime, and Weekend and Holiday Work

1. Supervisors Performing Unit Work

a. General Counsel's Evidence

Sharman testified that, since the election, supervisors have performed warehousemen work. He said that he observed supervisor Lynn performing warehousemen work on weekends and holidays. See also (GC Exh. 12). Although Clark corroborated his account, he also

[10] It is noteworthy that the following evidence was not provided: job descriptions or testimony regarding the duties of the open technician jobs; an explanation regarding how, if at all, Sharman and Hughes were qualified for these jobs; or who was hired for these jobs and why they were qualified.

[11] High density cabinets store smaller, higher-value parts. Delek also installed high density storage cabinets in 2012. See (R. Exh. 9).

confirmed that Lynn periodically performed warehousemen work before the election.[12]

b. Delek's Response

Anderson related that warehousemen receive 9 holidays, and are usually not assigned work on these dates, absent an emergency. He said that an emergency on-call list is maintained. He explained that, if maintenance requires a part from the warehouse on a holiday, Lynn is contacted, and that he then decides whether the assignment warrants calling in a warehouseman. See also (R. Exh. 11). He offered that Lynn periodically determines that it is more expeditious to just retrieve a part himself, instead of using the call in list for an isolated holiday assignment. He denied that there has been any change in this longstanding practice; he added that Lynn has been cross-trained to perform warehousemen work, when needed to do so.

Lynn agreed that he periodically performs warehousemen work, contended that there is a longstanding practice of supervision doing so, and insisted that his warehousemen know this. He added that he has always been included in the overtime rotation, although for personal reasons he previously rejected many overtime offers. He acknowledged that he worked during the 2015 Labor Day holiday, after being asked by a maintenance supervisor to retrieve a motor. He reported that he was not busy and, because it was only a 20-minute job, he thought that it was reasonable to just do it himself, instead of disturbing someone's holiday.

2. Access

Sharman said that, before the election, very few people had warehouse access, but, access has since broadened. See also (GC Exh. 11). Anderson indicated that many employees are afforded access and that this has been a longstanding practice; these individuals include managers, inspectors, shift supervisors, warehousemen, information technology employees and others. Lynn denied increasing access.

3. Reductions in Overtime, and Overnight and Weekend Shifts

Sharman contended that, before the election, he received about 10 to 20 hours of weekly overtime, but that, subsequently, he has only received about 3 hours of weekly overtime. Clark and Bishop essentially corroborated his account.

Delek provided records, which described warehouse work hours between June 2014 and June 2016. These records demonstrate a decrease in warehouse hours, and are described below:

Employee	Average Monthly Hours Jun. 2015 to Jun. 2016[13]	Average Monthly Hours Jun. 2014 to Jun. 2016[14]	Difference
Lynn	197	220	*(23)*
Bishop	195	216	*(21)*

[12] Clark agreed that Lynn has historically been offered warehouse overtime, but, had previously rejected the majority of this overtime due to personal reasons, which have since changed.

[13] Lynn, Bishop, Clark and Sharman were employed for 13 months, while Hughes was only employed 8.5 months.

[14] Lynn, Bishop, Clark and Sharman were employed for 28 months, while Hughes was only employed 23.5 months.

Clark	193	217	*(24)*
Hughes	215	216	*1*
Sharman	191	211	*(20)*

(R. Exhs. 5–6). Anderson said that warehouse overtime is generally driven by maintenance issues. He agreed that overtime has decreased and cited for 2 reasons: (1) RAMS has yielded fewer breakdowns; and (2) the January 2015 "turnaround" caused the refinery to run more efficiently with fewer maintenance issues.[15]

4. Overtime Rotation Issues

Sharman added that overtime used to be allocated to warehousemen via a seniority-based rotation. He said that overtime is now first offered to Lynn, who takes what he desires, and then to Clark. He said that any leftovers are offered to everyone else. Lynn claimed that the prior rotation remains intact. For the reasons previously stated, Sharman has been credited over Lynn.

H. Changed Job Duties

Sharman stated that, after the election, he was assigned several new duties, which included dumping chemical totes, without adequate training. He said that this assignment has caused him great anxiety due to his safety concerns. He said that he has also been newly assigned the dumping of oil barrels and other fluids, and has started "slinging," i.e., a slang term for a technique that uses straps to pull heavy equipment such as motors, pumps and turbines off trucks. He expressed concern that his forklift is not certified to lift some of these heavier items. Clark testified that he has not transported chemical totes, but has newly been asked to move heavy machinery and equipment. Regarding chemical totes, Lynn agreed that the warehousemen are responsible for moving them; he otherwise denied assigning any new duties. For the reasons previously noted, Sharman has been credited over Lynn.

I. Eating at One's Desk and Break Areas

Sharman testified that, before the election, warehousemen could eat at their work stations. He said that, subsequently, they have been required to eat in the maintenance break room. He said that Lynn issued this directive. Clark corroborated this point. Sharman also claimed that he has been banned from using non-maintenance break areas. Duford denied banning anyone from any break areas. He said that employees have always been able to use any break areas. He noted that the Employee Handbook generally prohibits eating at one's desk for safety reasons. Anderson corroborated his account. For the reasons previously noted, Duford's account has been credited. I note, additionally, that the safety concerns associated with warehousemen eating at their desks were reasonable. It is also implausible that Delek would have completely banned warehousemen from using any break areas in the refinery.

[15] The "turnaround" was a $50-million refinery tune-up. Anderson explained that, following a "turnaround," the refinery runs at peak efficiency, which temporarily causes an overtime drop.

J. Changes in 12-hour Lunch Breaks

Sharman stated that, before the election, whenever a warehouseman worked a 12-hour shift, which normally occurred during turnaround periods, he received a paid, 1-hour, meal break. He related that, subsequently, warehousemen were not given a paid 1-hour, lunch and instead, were given a paid 30-minute meal break, and told to clock out for 30 minutes. (Tr. 105). Bishop corroborated this point. Duford stated that 12-hour shift employees are entitled to a 1-hour break, and that this policy has not changed.

I credit Sharman's account. He was corroborated by Bishop, who appeared to be generally credible. I also note that, if Delek's policy regarding 12-hour lunch breaks remained unaltered, it would have seen fit to provide pay records, which demonstrated maintenance of the status quo ante. This evidentiary lapse tilts the credibility dispute in favor of Sharman.

K. Employee Handbook Policies

The GC has alleged that the following Employee Handbook policies are unlawful.

1. Use of Company Time, Property and Technology

This policy provides that:

> The use of company time, property or technology for purposes not directly related to Delek … business is strictly prohibited. This includes … promoting outside interests on company time …. Personal use of Delek … property without express approval … is prohibited. Property includes … computers …. It is our policy that email be used solely for the benefit of performing your duties on behalf of Delek …. The email and other information systems are not to be used in any way that may be disruptive, offensive to others, or harmful to morale, nor may they be used to solicit others for any reason ….

(Jt. Exh. 18 at 14).

2. Computer Use

This policy states, in relevant part, that:

> Team members are provided e-mail accounts for business communications…. E-mail communications … may be used only for company-related business …. Violation of Delek's policies regarding computer use may result in discipline, up to and including separation of employment.

(Jt. Exh. 18 at 14–15).

3. Conduct

This policy provides that, "[w]e will not accept conduct that Delek Refining feels reflects adversely on the team member or Delek." (Jt. Exh. 18 at 18).

4. Solicitation and Distribution of Literature

The policy relates that, "[f]or privacy and security reasons, team members are not allowed to give out other team members' addresses, phone numbers and other contact information." (Jt. Exh. 18 at 23).

5. Confidentiality

The policy stated as follows:

> As a condition of employment you agree that you will not, except as required in the conduct of Delek … business or as authorized in writing by the President of the Company, publish or disclose, either during your term of employment or any time thereafter, any … confidential information ….
>
> This includes responses to questions from …, the press, … or the public. In the event anyone makes inquiry… immediately report the inquiry to your Manager.

(Jt. Exh. 18 at 23).

III. ANALYSIS

A. 8(a)(1) Allegations

1. Employee Handbook Policies[16]

a. Generally

The Board has held that an employer violates the Act, when it maintains rules that reasonably tend to chill employees' Section 7 rights. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). The Board has held that a rule is unlawful, if it "explicitly restricts activities protected by Section 7." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004). If the rule does not explicitly restrict protected activities, it nevertheless violates the Act if, "(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." Id. at 647.

[16] These allegations are listed under complaint pars. 5– 9, and 26.

b. Use of Company Time, Property and Technology policy

This policy unlawfully restricts email to business-only purposes, and bans emails that are "disruptive, offensive …, or harmful to morale, [and] … used to solicit others for any reason." The Board has held that:

> [E]mployees who have rightful access to their employer's email system in the course of their work have a right to use the email system to engage in Section 7-protected communications on nonworking time. An employer may rebut the presumption by demonstrating that special circumstances necessary to maintain production or discipline justify restricting its employees' rights. Because limitations on employee communication should be no more restrictive than necessary to protect the employer's interests, … it will be the rare case where special circumstances justify a total ban on nonwork email use by employees.

Purple Communications, Inc., 361 NLRB No. 126, slip op. at 14 (2014) (citations and footnotes omitted).

Delek's email ban is, thus, unlawful in 2 ways. First, it limits employees' Section 7 rights to use email to engage in Section 7-protected communications during nonworking time. Delek failed to adduce any special circumstances that support a total ban. *Purple Communications*, *Inc.,* supra. Second, it restricts the usage of Delek's property for "promoting outside interests on company time," without management approval. See, e.g., *Our Way, Inc.*, 268 NLRB 394 (1983) (non-solicitation rules during working hours are invalid unless they expressly state that employees can solicit during lunch, breaks or non-working time).[17]

c. Computer Use policy

This policy only permits emails connected to "Company business"; it is, thus, unlawful. Delek failed to adduce any legitimizing circumstances. *Purple Communications, Inc.*, supra.

d. Conduct policy

This policy unlawfully provides that, "[w]e will not accept conduct that Delek Refining feels reflects adversely on the team member or Delek Refining." Such bans invalidly restrict employees' Section 7 rights to collectively complain about working conditions. See, e.g., *Casino San Pablo*, 361 NLRB No. 148 (2014) (insubordination or disrespectful conduct); *Costco Wholesale Corp.*, 358 NLRB 1100 (2012) (statements that damage Costco).

e. Solicitation and Distribution of Literature policy

The policy is unlawful; it states that employees cannot share their coworkers' contact information. The Board has found that similar rules unlawfully restricted employees' rights to

[17] *Aluminum Casting & Engineering Co.*, 328 NLRB 8 (1999) (employer must say that solicitation is allowed during breaks).

act collectively with coworkers regarding Section 7 activities. See, e.g., *Costco*, supra; *Bigg's Food*, 347 NLRB 425, 425 fn. 3 (2006).

f. Confidentiality policy

The *Confidentiality* policy unlawfully bans unauthorized discussions with the media, government or similar outlets. Preauthorization requirements interfere with one's Section 7 right to "improve terms and conditions of employment" by seeking outside assistance. See, e.g., *Valley Hospital Medical Center, Inc.*, 351 NLRB 1250, 1252 (2007); *Knauz BMW*, 358 NLRB 1754 (2012).

2. Threats, Interrogations and Other Comments[18]

a. April 17 Meeting with Duford

(1) Interrogation

Duford did not unlawfully interrogate employees. As noted, he credibly denied asking employees why they wanted to unionize.

(2) Threats

Duford and LaBella did not make unlawful threats. The complaint alleged that they threatened: bonus, seniority and benefit cuts; to end bidding to the PM unit; and to cut raises.

Regarding threats, the Supreme Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969), held that an employer may express its general views about unionism, so long as such communications do not contain a threat of reprisal or force. It also explained that a prediction must be based upon objective fact regarding matters beyond the employer's present control. Moreover, a statement is an unlawful threat, when it coerces employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a). In evaluating such statements, the Board:

> [D]oes not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act.

Sage Dining Service, 312 NLRB 845, 846 (1993); *Double D Construction Group,* 339 NLRB 303 (2003) ("test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.").

Duford lawfully stated that everything was negotiable in bargaining, and reasonably contrasted the PM unit's benefits under the CBA with those benefits provided to the warehousemen. This was rational, given that the warehousemen were seeking to be dovetailed into the PM unit's CBA. In doing so, he accurately stated that the PM unit's CBA does not

[18] These allegations are listed under complaint pars. 10– 15, and 26.

provide SARS or bonuses. He also correctly pointed out that the CBA defines wages and sets annual raises, controls job bidding, and contains various seniority definitions, which might be initially less favorable to the warehousemen, if they were dovetailed. These statements were not unlawful for several reasons. First, they accurately described the distinctions between the 2 groups. Second, given that the warehousemen were seeking to be rolled into the PM unit's CBA, it was objectively reasonable for Duford to highlight these differences.[19] Third, his projections were outside of Delek's unilateral control, and would necessarily flow from mutual good faith bargaining between Delek and the Union. Finally, his statements could not be reasonably construed as coercive, given that Delek maintains a positive and non-hostile working relationship with the PM unit and Union overall. I find, as a result, that his commentary was not an unlawful threat, and that he offered extensive context for his objective opinion. See, e.g., *Jefferson Smurfit Corp*., 325 NLRB 280, 280 fn. 3 (1998) (benefits "could go either way" as a result of collective bargaining); *Telex Communications*, 294 NLRB 1136, 1140 (1989) (bargaining was a "give-and-take situation"); *Pilliod of Mississippi, Inc.*, 275 NLRB 799, 800 (1985) (employer did not have to give anything in negotiations and employees might lose benefits).

(3) Discarded Application Comment

Duford did not make this comment. Delek, thus, did not violate the Act as alleged.

b. June 3 Meeting with Duford

Duford's commentary was lawful. He fairly and accurately discussed the potential implications of the warehousemen being dovetailed into the PM unit's CBA. He accurately described the CBA's seniority provisions and objectively explained the consequences of dovetailing on seniority and benefits. He rationally explained that such inclusion issues were a negotiable matter. This discussion was not a coercive threat to eliminate seniority or cut vacation. Given that this comment was made in the context of Delek's long and stable bargaining relationship with the Union in the PM unit, it could not have been rationally construed as threatening. See, e.g., *Host International, Inc.*, 195 NLRB 348, 348 (1972) (similar comment was not "a threat to discontinue existing benefits," but rather was "merely descriptive of the employer's bargaining strategy, designed to let employees know that unionization does not mean automatic increases in benefits.").

c. June 10 Meeting with Anderson

Anderson presented a scripted campaign discussion, which contained truthful information. His presentation did not unlawfully threaten seniority or bonus losses, and was non-coercive.

[19] Or put another way, it would be unreasonable for the Union in the representation case forum to argue for inclusion of the warehousemen, and then contend in an unfair labor practice proceeding that Delek made unlawful threats, when it objectively identified what the consequence of such inclusion might entail.

d. June 15 Meeting with Lynn

Lynn unlawfully told the warehousemen that they would lose their seniority, raises, and bonuses, if they unionized. Unlike Duford, who presented the real and objective possibility that, if the warehousemen were dovetailed, as desired, their seniority levels might change, Lynn made an unlawful blanket threat. See, e.g., *Metro One Loss Prevention Services Group*, 356 NLRB 89 (2010); *Pembrook Management*, 296 NLRB 1226, 1239 (1989).

e. July 8 Lynn's Instruction to Remove Union Stickers

Lynn unlawfully told Sharman to remove his Union stickers from his hard hat. Lynn acknowledged issuing this order, agreed that there is no prohibition against stickers, and only offered a half-hearted explanation, without any evidentiary support, that he was concerned that the sticker's adhesive might compromise the integrity of the hard hat. It is well settled that an employer violates Section 8(a)(1), when it prohibits employees from wearing union insignia at the workplace, absent special circumstances, which were not established herein. *Daily Grill*, 364 NLRB No. 36 (2016).

f. December 22 – Lynn's Threat

Lynn told Clark that the warehouse would be undergoing changes and, if they didn't like it, "McDonald's is always hiring." The Board deems such statements to be invalid implied discharge threats. See, e.g., *Amalgamated Transit Union, Local 689*, 363 NLRB No. 43 (2015); *Mesker Door, Inc.*, 357 NLRB 591 (2011).

B. 8(a)(5) Allegations[20]

1. Legal Precedent

An employer must bargain in good faith with a union regarding wages, hours and other terms and conditions of employment.[21] *NLRB v. Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). An employer violates the Act, when it makes material unilateral changes in mandatory bargaining topics. *NLRB v. Katz*, 369 U.S. 736 (1962). In order to trigger a bargaining obligation, a change must be material, substantial and significant. *Crittenton Hospital*, 342 NLRB 686 (2004). The GC can establish a prima facie unilateral change violation, if it shows that an employer made a material and substantial change in a term of employment without negotiating. The burden then shifts to the employer to show that the change was permissible (e.g., consistent with established past practice). *Fresno Bee*, 339 NLRB 1214 (2003).

2. Supervisors Performing Unit Work

Delek did not violate the Act by assigning unit work to Lynn. Although it is well-

[20] These allegations are listed under complaint pars. 20–23, 25, and 28.

[21] As a threshold matter, Delek does not dispute that the alleged unilateral changes at issue herein were enacted without notice or bargaining with the Union.

established that the unilateral assignment of work previously performed by bargaining unit personnel to supervisors outside of the unit is a mandatory subject of bargaining (see, e.g., *Land O' Lakes*, 299 NLRB 982 (1990)),[22] an employer does not violate the Act when it maintains the status quo, after a union wins a Board election, by continuing to assign unit work to supervisors. See, e.g., *Presbyterian University Hospital*, 325 NLRB 443 (1998). In the instant case, Lynn held a longstanding practice of performing unit before the election, and his continuance of performing such work after the election, represented that maintenance of the status quo ante. His actions in this regard did not, as a result, violate the Act.

3. Supervisory Access to the Warehouse

Delek did not violate the Act, when it afforded additional personnel access to the warehouse. An employer's right to make an operational change may be subject to mandatory bargaining, when such a change has a significant impact on the unit. *Bundy Corp.*, 292 NLRB 671 (1989); *Coca Cola Bottling Works*, 186 NLRB 1050 (1970). In the instant case, there is no evidence that the additional access at issue had a significant impact.

4. Different Methodology for Assigning Overtime

Delek unlawfully modified its warehouse overtime distribution process after the election by eliminating the seniority-based rotation. This action was taken without notice or good faith bargaining. Given that overtime distribution is a mandatory bargaining subject, such unilateral action was unlawful. *Dearborn Country Club*, 298 NLRB 915 (1990).

5. Reducing Employees scheduled to Work Overnight and Weekends

Delek did not unilaterally change its policy of assigning overnight and weekend shifts to warehousemen. It continues to assign such work, as needed. Anderson credibly explained that the reliability of the refinery increased dramatically as a result of RAMS and the turnaround, which has resulted in less warehouse overtime. This scenario is not a departure from the "as needed" overtime policy, which remains intact.

6. Lynn's Labor Day Holiday Work

Delek did not unilaterally change its practice of assigning holiday work to the warehousemen unit. As stated, Lynn held a longstanding practice of performing unit work before the election, and his performance of such work on a holiday following the election, represented maintenance of the status quo ante.[23]

7. Break Room Usage

Anderson and Duford credibly testified that warehousemen can use any refinery break

[22] An employer must, as a result, notify and offer to bargain with a union about removal of bargaining unit work, before it may assign such work to newly created supervisory positions. *Hampton House*, 317 NLRB 1005 (1995).

[23] Even assuming arguendo that Lynn's actions were a deviation, a one-time deviation of a supervisor working on a single holiday does not rise to the level of a material change, which would trigger a bargaining obligation.

area. Delek, thus, did not unilaterally change the break room policy, as alleged.

8. Work Station Meals

Anderson credibly testified that warehousemen have never been allowed to eat at their desks. He explained that this policy protects employees against accidentally consuming foreign matter. Delek, therefore, did not unilaterally change this policy as alleged.

9. Paid, 1-Hour Meal Breaks for 12-hour Shifts

Delek violated the Act, when, after the election, it ceased providing warehousemen, who worked 12-hour shifts, a 1-hour paid meal break, and instead, required them to clock out for a 30-minute period. Given that it is well-established that lunch breaks and related compensation are mandatory bargaining topics, Delek's unilateral action was unlawful. See, e.g., *Mackie Automotive Systems*, 336 NLRB 347, 350 (2001); *Kurdziel Iron of Wauseon, Inc.*, 327 NLRB 155, 156 (1998), enf. 208 F.3d 214 (6th Cir. 2000).

10. Moving Sharman's Office Area

Sharman's computer was moved roughly 20 feet from one portion of the warehouse office to another, in order to facilitate the installation of high-density storage cabinets. This change was de minimis in nature, did not impede his performance,[24] and was consistent with RAMS.[25] I find, as a result, that the very slight relocation of a computer work station within the confines of a constant area for a warehouseman, who does not work in a private area, is not a substantial and material change, which requires bargaining. In making this finding, I also note that Delek had an established past practice of shifting warehouse work stations to accommodate the installation of high density cabinetry under RAMS, and made an earlier relocation in 2012.

11. New Duties

Delek violated the Act by unilaterally assigning new duties to the warehousemen. Since the election, Sharman and Clark have been newly required to: deliver and dump chemical totes; dump oil barrels and other fluids; and "sling." These duties were added without notice or bargaining, and were significant enough in scope to trigger a host of new safety concerns for these employees. These new duties, accordingly, rose to the level of a mandatory bargaining topic. See, e.g. *St. John's Hospital*, 281 NLRB 1163, 1166, 1168 (1986), enfd. 825 F.2d 740 (3d Cir. 1987); *Cincinnati Enquirer*, 279 NLRB 1023, 1031–1032 (1986).

C. 8(a)(3) Allegations[26]

The complaint alleged that the unlawful unilateral changes analyzed above

[24] The vast majority of his position, however, involved working away from this computer station (i.e. it entails maneuvering within the warehouse, retrieving and delivering supplies, and using other terminals).

[25] The first phase of this RAMS overhaul occurred in 2012, which was before the Union's organizing drive.

[26] These allegations are listed under complaint pars. 16, 20–24, and 27.

simultaneously violated Section 8(a)(3). These contentions are addressed below.

1. Legal Precedent

Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), which was approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983) governs this analysis. Under that framework, the General Counsel has the initial burden to prove that an employee's Section 7 activity was a motivating factor in the employer's action. The elements commonly required to support this initial showing are union or other protected concerted activity by the employee, employer knowledge and animus. See, e.g., *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 (2014), enfd. 801 F.3d 767 (7th Cir. 2015). If the General Counsel makes the required initial showing, the burden shifts to the employer to prove by a preponderance of the evidence that it would have taken the same action, even in the absence of the protected concerted activity. Id. It does not, however, meet its burden merely by establishing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. See, e.g., *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015). If the evidence establishes that the proffered reasons for the employer's action are pretextual, i.e., either false or not actually relied upon, the employer fails by definition to show that it would have taken the same action for those reasons, regardless of the protected conduct. See *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

2. Supervisors Performing Unit Work

Delek did not violate Section 8(a)(3) by assigning unit work to supervisor Lynn. The General Counsel made a prima facie showing of an 8(a)(3) violation by showing that: the warehousemen were engaged in an organizing campaign; Delek knew about the campaign; and Delek held animus. Animus was demonstrated by the various comments and actions that violated Section 8(a)(1). Delek adduced, however, that it would have assigned unit work to supervision, irrespective of the Union's organizing drive. As noted, it had a longstanding practice of assigning such work to supervision. Thus, Delek did not violate Section 8(a)(3).

3. Warehouse Access

Delek did not violate Section 8(a)(3), when it afforded additional managers warehouse access. Although the General Counsel made a prima facie showing of a *Wright Line* violation, Delek demonstrated that it would have granted access to others, irrespective of the Union's organizing drive. Specifically, it had a longstanding practice of granting access to non-warehouse supervisors, and such access was granted in accordance with RAMS, which was effectuated well before the organizing drive. In addition, as noted, there is no evidence that the additional supervisors performed unit work or otherwise significantly impacted the warehousemen unit.

4. Overtime Assignments

Given that Delek violated Section 8(a)(5), when it unilaterally modified the overtime

distribution procedure, a further finding of an 8(a)(3) violation would be cumulative and not impact the remedy. It is, thus, unnecessary to decide this redundant allegation. *Tri-Tech Services*, 340 NLRB 894, 895–96 (2003); *Sygma Network Corp.*, 317 NLRB 411 (1995).

5. Reducing Overnight and Weekend Assignments

Delek did not violate Section 8(a)(3), when it cut overnight and weekend work assigned to warehouse personnel. Although the General Counsel made a prima facie *Wright Line* showing, such work would have decreased irrespective of the Union. Delek demonstrated that warehousemen were assigned additional work as needed, and that it required less overtime because of RAMS and the turnaround.

6. Labor Day Holiday Work

Delek did not violate Section 8(a)(3), when supervisor Lynn performed Labor Day holiday work. Although the General Counsel made a prima facie *Wright Line* showing, Delek demonstrated that Lynn had a longstanding practice of performing holiday and other voluntary overtime work. It also demonstrated that Lynn became more available to perform such work after the election for personal reasons, which were disconnected to the Union's organizing drive.

7. Break Room Access

Delek did not violate Section 8(a)(3) by banning warehouse employees from maintenance break areas. As noted, warehousemen were consistently permitted to use all break areas.

8. Work Station Meals

Delek did not violate Section 8(a)(3), when it ceased permitting warehousemen to eat at their desks. Although the General Counsel made a prima facie *Wright Line* showing, Delek demonstrated that employees are generally not permitted to eat at their desks, and that this matter is addressed under the Employee Handbook. (Jt. Exh. 18 at 17). Anderson credibly explained that Delek's its long-term policy protected against warehousemen consuming foreign objects when eating at their desks. Delek, thus, successfully established that warehousemen would not have been permitted to continue to eat at their work areas, irrespective of the organizing drive.[27]

9. Paid, 1-hour, Meal Periods of 12-hour Shifts

Given that it has been found that Delek violated Section 8(a)(5), when it unlawfully ceased providing a paid, 1-hour lunch break to 12-hour shift employees, a further finding of an 8(a)(3) violation would be cumulative. *Tri-Tech Services*, supra.

[27] To the extent that some warehouse employees have previously eaten at their work stations, I find that this was done without management's knowledge, and that, if aware, management would have curtailed such activity.

10. Moving Sharman's Work Station

Delek did not violate Section 8(a)(3) by moving Sharman's work station. Although the General Counsel made a prima facie *Wright Line* showing, Delek showed that it would have moved his work station, regardless of the organizing drive in order to install high-density storage under RAMS.

11. Assigning New Duties to the Warehousemen

Given that it has been found that Delek violated Section 8(a)(5) in assigning these new duties, a further finding of a Section 8(a)(3) violation would be cumulative and would not impact the remedy. *Tri-Tech Services, Inc.*, supra.

12. Smoking Breaks

Delek did not violate Section 8(a)(3) by more strictly enforcing its smoke break policy. Although the General Counsel made a prima facie *Wright Line* showing, Delek demonstrated it would have advised the warehousemen that they were exceeding their permissible number of smoke breaks, irrespective of the Union's organizing drive. Delek has a longstanding, written policy, which capped smoke breaks. See (Jt. Exh. 18). Lynn's reminder regarding the policy was triggered by an independent event, i.e. a call from security. It is apparent, as result, that Delek would have curtailed such excesses, irrespective of the Union's organizing drive.

13. Refusal to Consider for Placement

Delek did not violate Section 8(a)(3) by refusing to consider Sharman and Hughes for placement, or by refusing to hire them for field technician positions. The Board, in *FES*, 331 NLRB 9 (2000), set forth the evidentiary framework for analyzing refusal to hire and refusal to consider for employment complaint allegations. In refusal to hire allegations, General Counsel must show under the burden shifting analysis in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981) that: (1) the company was hiring or had concrete plans to hire at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the position for hire; and (3) that antiunion animus contributed to the decision not to hire the applicants. Once that is established, the burden shifts to the company to show that it would not have hired the applicants, even in the absence of the union activity or affiliation. 331 NLRB at 12. In refusal to consider allegations, the General Counsel bears the burden of showing that: (1) the respondent excluded applicants from the hiring process; and (2) antiunion animus contributed to the decision not to consider the applicants for employment. Once this is established, the burden shifts to respondent to show that it would not have considered the applicants, even in the absence of their union activity or affiliation. *Id.* at 15.

Regarding the refusal to hire allegation, although Delek had concrete plans to hire 12 individuals for the Field Technician positions (see (R. Exhs. 1–2)), the record fails to show that either Sharman or Hughes had sufficient experience to perform these jobs. The record does not contain a job posting, job description or other documentary evidence regarding this position, which describes the experience needed to successfully perform the job. It similarly fails to

reveal the experience levels of the employees who were hired for these slots, or show how Sharman and Hughes held equivalent experience. It solely offers Duford's unrebutted testimony that: Delek hired 12 individuals *out of the more than 520 candidates who applied*; Sharman and Hughes were rejected because they mainly had warehousing experience; the open positions required industrial, gas, oil and manufacturing experience, which Sharman and Hughes lacked; and that Delek, consequently, took no further action on their applications. I find, as a result, that the General Counsel failed to prove the second element of a prima facie refusal to hire case, i.e., that the applicants had sufficient experience or training to perform the positions at issue. This allegation, thus, lacks merit.

Regarding the refusal to consider allegation, this allegation must fail for two reasons. First, although there is evidence of animus, the General Counsel failed to show that Sharman and Hughes were actually excluded from the hiring process. To the contrary, the record demonstrates that their applications were processed, and considered. See (R. Exhs. 1–2). Second, even assuming arguendo that they were excluded, they were, as noted, unqualified for the jobs at issue.

CONCLUSIONS OF LAW

1. Delek is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Delek violated Section 8(a)(1) by maintaining these overbroad policies in its Employee Handbook:

a. The *Use of Company Time, Property and Technology* policy to the extent that it: restricts email to business-only purposes; bans emails that are "disruptive, offensive …, or harmful to morale, [and] … used to solicit others for any reason;" restricts the usage of Delek property for non-business purposes with the express approval of management; and broadly prohibits "promoting outside interests on company time."

b. The *Computer Use* policy to the extent that it limits email usage to "Company related business."

c. The *Conduct* policy to the extent that it bans "conduct that … reflects adversely on the team member or Delek."

d. The *Solicitation and Distribution of Literature* policy to the extent that it prohibits employees from disseminating their coworkers' contact information.

e. The *Confidentiality* policy to the extent that it unlawfully bans employees from talking to the media, government or other outlets without authorization.

4. Delek violated Section 8(a)(1) when:

a. Lynn threatened employees that they would lose their seniority rights and bonuses, and have their raises withheld, if they unionized.

b. Lynn prohibited employees from wearing Union insignia at the workplace.

c. Lynn threatened employees with discharge by telling them that they should find other employment, if they were unhappy.

5. At all times since June 22, 2015, the Union has been the certified exclusive collective-bargaining representative, within the meaning of Section 9(a) of the Act, of the following appropriate bargaining unit:

Included: All storeroom attendants (i.e., warehousemen).

Excluded: All supervisory employees as defined in the Act, technical, clerical, safety, plant protection and security, marketing terminal, loading rack and its employees, and professional employees.

6. Delek violated Section 8(a)(1) and (5) of the Act by:

a. Ceasing to grant the warehousemen, who worked 12-hour shifts, a 1-hour paid meal break, without first notifying the Union and giving it an opportunity to bargain.

b. Assigning new duties to the warehousemen, without first notifying the Union and giving it an opportunity to bargain.

c. Changing its overtime distribution system in the warehouse, without first notifying the Union and giving it an opportunity to bargain.

7. The unfair labor practices set forth above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Delek committed unfair labor practices, it is ordered to cease and desist and to take certain affirmative action designed to effectuate the Act's policies. It must rescind the overbroad Employee Handbook rules, and furnish all current employees with inserts for their current Handbooks that: (1) advise that the unlawful rules have been rescinded; or (2) provide a lawfully worded rule on adhesive backing that will cover the unlawful rules; or publish and distribute to all current employees revised Handbooks that: (1) do not contain the unlawful rules; or (2) provide lawfully worded rules.

Having found that it violated Section 8(a)(5) by unilaterally eliminating a 1-hour paid lunch break for warehousemen working 12-hour shifts, by assigning new duties to the

warehousemen, and by changing its warehouse overtime distribution system, without first notifying the Union and giving it an opportunity to bargain, it must rescind the changes and restore the status quo ante. Any make whole remedy shall be computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F. 2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Affected employees shall be compensated for the adverse tax consequences, if any, associated with receiving a lump-sum backpay award, and Respondent shall file a report with the Regional Director allocating backpay to the appropriate calendar year for each worker. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Delek shall distribute remedial notices electronically via email, intranet, internet, or other appropriate electronic means to its employees, in addition to the traditional physical posting of paper notices, if it customarily communicates with workers in this manner. *J Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[28]

ORDER

Delek Refining, Ltd., Tyler, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

a. Maintaining an overbroad *Use of Company Time, Property and Technology* policy, which: restricts email to business-only purposes; bans emails that are "disruptive, offensive …, or harmful to morale, [and] … used to solicit others for any reason;" restricts the usage of Delek property for non-business purposes with the express approval of management; and broadly prohibits "promoting outside interests on company time."

b. Maintaining an overbroad *Computer Use* policy, which limited email usage to "Company related business."

c. Maintaining an overbroad *Conduct* policy, which bans "conduct that … reflects adversely on the team member or Delek."

d. Maintaining an overbroad *Solicitation and Distribution of Literature* policy, which prohibits employees from giving out their coworkers' contact information.

e. Maintaining an overbroad *Confidentiality* policy, which bans employees from talking to the media, government or other outlets without authorization.

[28] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

f. Threatening employees with the loss of seniority rights, raises and bonuses because of their Union activities.

g. Prohibiting employees from wearing Union insignia in the workplace.

h. Threatening employees with discharge because of their Union activities by telling them that they should find other employment, if they are unhappy.

i. Failing and refusing to bargain in good faith with the Union as the exclusive collective-bargaining representative of employees in the following appropriate unit:

Included: All storeroom attendants (i.e. warehousemen).

Excluded: All supervisory employees as defined in the Act, technical, clerical, safety, plant protection and security, marketing terminal, loading rack and its employees, and professional employees.

j. Unilaterally ceasing to provide warehouse employees, who worked 12-hour shifts, a 1-hour paid lunch break, without first notifying the Union and giving it an opportunity to bargain.

k. Unilaterally assigning new duties to the warehousemen, without first notifying the Union and giving it an opportunity to bargain

l. Unilaterally changing its overtime distribution system in the warehouse, without first notifying the Union and giving it an opportunity to bargain.

m. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

a. Rescind or modify the language in the *Use of Company Time, Property and Technology* policy to the extent that it: restricts email to business-only purposes; bans emails that are "disruptive, offensive …, or harmful to morale, [and] … used to solicit others for any reason;" restricts the usage of Delek property for non-business purposes with the express approval of management; and broadly prohibits "promoting outside interests on company time."

b. Rescind or modify the language in the *Computer Use* policy to the extent that it limited email usage to "Company related business."

c. Rescind or modify the language in the *Conduct* policy to the extent that it bans "conduct that … reflects adversely on the team member or Delek."

d. Rescind or modify the language in the *Solicitation and Distribution of*

Literature policy to the extent that it prohibits employees from giving out their coworkers' contact information.

e. Rescind or modify the language in the *Confidentiality* policy to the extent that it unlawfully bans employees from talking to the media, government or other outlets without authorization.

f. Furnish all current employees with inserts for the Employee Handbook that

i. Advise that the unlawful rules have been rescinded, or

ii. Provide the language of lawful rules or publish and distribute a revised Employee Handbook that

1. Does not contain the unlawful rules, or
2. Provides the language of lawful rules.

g. Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of the warehousemen.

h. Rescind its elimination of providing a 1-hour paid lunch to 12-hour shift employees that was unilaterally implemented on or about September 1, 2015.

i. Rescind its assignment of new duties to the warehousemen that was implemented on or about February 8, 2016.

j. Rescind its changes to the warehouse overtime distribution system that it unilaterally implemented after the Union election.

k. Make any warehousemen whole for their loss of the 1-hour paid lunch break when they worked 12-hour shifts, or overtime losses, and compensate them for the adverse tax consequences, if any, associated with receiving lump-sum backpay awards, and file a report with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, allocating backpay to the appropriate calendar quarters for each.

l. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the backpay amounts due under the terms of this Order.

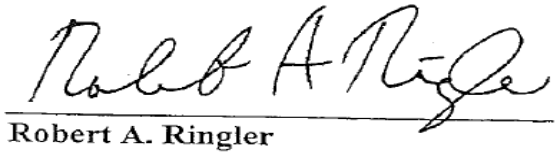
m. Within 14 days after service by Region 16, post at its Tyler, Texas facility copies of the attached notice marked "Appendix."[29] Copies of the notice, on forms provided by

[29] If this Order is enforced by a judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United

the Regional Director, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, it shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at any time since June 15, 2015.

n. Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that it has taken to comply.

Dated Washington, D.C. October 19, 2016



Robert A. Ringler
Administrative Law Judge

States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT maintain disciplinary provisions in our Employee Handbook, which: restrict email to business-only purposes; ban emails that are "disruptive, offensive …, or harmful to morale, [and] … used to solicit others for any reason;" restrict the usage of our property for non-business purposes with the express approval of management; and prohibit "promoting outside interests on company time."

WE WILL NOT maintain disciplinary provisions in our Employee Handbook, which limit email usage to "Company related business."

WE WILL NOT maintain disciplinary provisions in our Employee Handbook, which bans conduct that we feel reflects adversely on you or us.

WE WILL NOT maintain disciplinary provisions in our Employee Handbook, which prohibits you from giving out your coworkers' addresses, phone numbers and other contact information.

WE WILL NOT maintain disciplinary provisions in our Employee Handbook, which ban you from talking to the media, government or other outlets without authorization.

WE WILL NOT threaten to cut your seniority rights because of your Union activities.

WE WILL NOT threaten to withhold raises and bonuses because of your Union activities.

WE WILL NOT prohibit you from wearing Union insignia in our workplace.

WE WILL NOT threaten to fire you because of your Union activities by telling you that you

should find other employment, if you are unhappy.

WE WILL NOT refuse to bargain collectively with the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL–CIO–CLC (the Union) as the exclusive collective-bargaining representative of our employees in the following appropriate bargaining unit:

> Included: All storeroom attendants (i.e, warehousemen).
>
> Excluded: All supervisory employees as defined in the Act, technical, clerical, safety, plant protection and security, marketing terminal, loading rack and its employees, and professional employees.

WE WILL NOT stop providing warehousemen, who worked 12-hour shifts, a 1-hour paid lunch break, without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT assign new duties to the warehousemen, or change their overtime distribution system, without first notifying the Union and giving it an opportunity to bargain.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights set forth above.

WE WILL rescind or modify these disciplinary provisions in our Employee Handbook:

1. The *Use of Company Time, Property and Technology* policy to the extent that it: limits your email to business-only purposes; bans emails that are disruptive, offensive or harmful to morale, or used to solicit others for any reason; restricts the usage of our property for any non-business purposes without the express approval of management; and broadly prohibits you from promoting outside interests on company time.

2. The *Computer Use* policy to the extent that it bans emails unrelated to Company business.

3. The *Conduct* policy to the extent that it bans any conduct that we feel reflects poorly adversely on you or us.

4. The *Solicitation and Distribution of Literature* policy to the extent that it prohibits you from giving out your coworkers' contact information.

5. The *Confidentiality* policy to the extent that it bans you from talking to the media, government or other outlets without authorization.

WE WILL furnish all of you with inserts for the current Employee Handbook that:

1. Advise that the unlawful provisions, above have been rescinded, or

2. Provide the language of lawful provisions, or publish and distribute revised Employee Handbooks that:

    a. Do not contain the unlawful provisions, or
    b. Provide the language of lawful provisions.

WE WILL, before implementing any changes in your wages, hours, or other terms and conditions of employment, notify and, on request, bargain with the Union as the exclusive bargaining representative of our unit employees.

WE WILL rescind our elimination of the 1-hour paid lunch for 12-hour shift employees that we unilaterally made on September 1, 2015.

WE WILL rescind the new duties that we unilaterally assigned to warehouse technicians on February 8, 2016.

WE WILL rescind the changes made to our warehouse overtime policy after the Union election.

WE WILL make any affected warehousemen whole for their loss of the 1-hour paid lunch break during 12-hour shifts and overtime losses, and **WE WILL** compensate them for the adverse tax consequences, if any, associated with receiving lump-sum backpay awards, and file a report with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, allocating backpay to the appropriate calendar quarters for each.

DELEK REFINING, LTD.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102–6178
(817) 978–2921, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/16-CA-161390 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (817) 978–2925.